Supreme Court, U.S.
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No. 04 123

In The
Supreme Court of the United States

JACOB BLAZ, On Behalf of Himself and All Others Similarly Situated,

Petitioner,

v.

ROBERT A. BELFER; NORMAN P. BLAKE, JR.; RICHARD B. BUY; RICHARD A. CAUSEY; RONNIE C. CHAN; JOHN H. DUNCAN; ANDREW S. FASTOW; JOE H. FOY; WENDY L. GRAMM; KEN L. HARRISON; ROBERT K. JAEDICKE; KENNETH L. LAY; CHARLES A. LEMAISTRE; JEROME J. MEYER; JEFFREY S. SKILLING; JOHN A. URQUHART; JOHN WAKEHAM; CHARLES E. WALKER; BRUCE G. WILLISON; HERBERT S. WINOKUR, JR.; and ARTHUR ANDERSEN, LLP,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Pursuant to *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), does a statute that impairs a plaintiff's ability to recover for pre-enactment conduct attach new legal consequences to such conduct, and therefore have an impermissible retroactive effect?

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all the parties to this proceeding. Petitioner is not a corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 368 F. 3d 501 (5th Cir. 2004). The Opinion of the United States District Court for the Southern District of Texas is reported at 2002 U.S. Dist. LEXIS 26261 (August 16, 2002).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 22, 2004. The order of the court of appeals denying Petitioner's petition for rehearing *en banc* was entered on May 20, 2004. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the Securities Litigation Uniform Standards Act ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227 (1998), codified at 15 U.S.C. §§ 77p (amending Securities Act of 1933) and 78bb (amending Securities Exchange Act of 1934) (West 2002), which provides:

> (a) Remedies additional. Except as provided in subsection (b), the rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity.
>
> (b) Class action limitations. No covered class action based upon the statutory or common law

of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(c) Removal of covered class actions. Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

(d) Preservation of certain actions.

(1) Actions under State law of State of incorporation.

(A) Actions preserved. Notwithstanding subsection (b) or (c), a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(B) Permissible actions. A covered class action is described in this subparagraph if it involves –

(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that –

(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(2) State actions.

(A) In general. Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(B) State pension plan defined. For purposes of this paragraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of the State or political subdivision thereof, or by any agency or instrumentality thereof.

(3) Actions under contractual agreements between issuers and indenture trustees. Notwithstanding subsection (b) or (c), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by

a party to the agreement or a successor to such party.

(4) Remand of removed actions. In an action that has been removed from a State court pursuant to subsection (c), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(e) Preservation of State jurisdiction. The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(f) Definitions. For purposes of this section, the following definitions shall apply:

(1) Affiliate of the issuer. The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(2) Covered class action.

(A) In general. The term "covered class action" means –

(i) any single lawsuit in which –

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(B) Exception for derivative actions. Notwithstanding subparagraph (A), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(C) Counting of certain class members. For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(D) Rule of construction. Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

(3) Covered security. The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under this title pursuant to rules issued by the Commission under section 4(2).

STATEMENT OF THE CASE

Factual Background

This is a putative class action brought by Petitioner on behalf of himself and all purchasers of the publicly traded securities of Enron Corporation ("Enron") during the period from April 11, 1997 to October 15, 1998, inclusive (the "Class Period"), against certain officers and directors of Enron and Enron's outside auditor Arthur Andersen, LLP (collectively, "Respondents"). During the Class Period, Respondents perpetrated one of the largest, longest-lasting, and most damaging frauds in American corporate history. Beginning as early as the first quarter of 1997, the officers and directors of Enron, with the knowing assistance of Arthur Andersen, established a series of complex off-balance-sheet entities which were created to engage in hedging, trading, and other transactions for the benefit of Enron while keeping massive debts and liabilities off Enron's balance sheet. These off-balance-sheet entities were improperly created to defraud the investing public, including Petitioner and similarly situated investors, while enriching Enron insiders, including some of the Respondents who had ownership and/or managerial

positions in the entities. Through its off-balance-sheet entities and transactions, Enron improperly concealed from the public its true debt load, which had the effect of artificially inflating its revenues, earnings, and stock price throughout the Class Period.

Respondents perpetrated this massive fraud and successfully concealed it continuously for a period of more than four years. Once the truth regarding Respondents' fraud began to emerge on October 16, 2001, Enron was forced to admit that it had reported materially false and misleading financial results for every quarterly and yearly period since the first quarter of 1997. On November 8, 2001, Enron announced that it would restate its financial results for all of 1997, 1998, 1999, 2000, and the first two quarters of 2001, thereby admitting that it had consistently reported materially false and misleading financial results for more than four years. As the resulting scandal mounted, the value of Enron common stock plummeted to pennies, and Enron ultimately filed for bankruptcy on December 2, 2002, leaving Petitioner and similarly situated investors with worthless Enron securities.

Procedural Background

Petitioner commenced this action on January 30, 2002 by filing his Original Petition in the District Court of Harris County, Texas. On March 26, 2002, Respondent Lay removed this action to the United States District Court for the Southern District of Texas. The sole basis for the removal was the purported application of SLUSA. On April 25, 2002, Petitioner filed a motion to remand this action to state court on the grounds that SLUSA, which was enacted subsequent to the end of the Class Period,

could not be applied retroactively, and therefore the district court lacked jurisdiction. On August 15, 2002, the district court entered a Memorandum and Order of Dismissal denying Petitioner's motion to remand and dismissing the action pursuant to SLUSA, 15 U.S.C. § 78bb(f)(1)(B)(2).

Petitioner subsequently appealed to the court of appeals the district court's Order of Dismissal, arguing that the district court erred in holding that the removal from state court and dismissal of this action pursuant to SLUSA did not have an impermissible retroactive effect. On February 4, 2004, a panel of the court of appeals heard oral argument. On April 22, 2004, the court of appeals issued an opinion affirming the district court's Order of Dismissal.

ARGUMENT

Pursuant to *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), in determining whether the application of a statute would be impermissibly retroactive, "[t]he critical question is 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Id.* at 270. Merely characterizing the new statute as a "procedural" rule that governs "secondary" conduct, as opposed to a "substantive" rule that governs "primary" conduct, does not satisfy the court's responsibility to determine whether the statute has an impermissible retroactive effect. *Lindh v. Murphy*, 521 U.S. 320, 326 (1997). "Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of

a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 269. *See also Martin v. Hadix*, 527 U.S. 343, 357-58 (1999) (quoting *Landgraf*, 511 U.S. at 270) ("The inquiry into whether a statute operates retroactively demands a common sense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.' This judgment should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.' ").

Pursuant to *Landgraf*, lower federal courts have consistently held that a statute that impairs a plaintiff's ability to recover for pre-enactment conduct attaches new legal consequences to such conduct, and therefore has an impermissible retroactive effect. *See, e.g., Gubitosi v. Zegeye*, 28 F. Supp.2d 298, 305 (E.D. Pa. 1998) (citations omitted) ("Given that the application of the SRA amendment would therefore have the effect of impairing the plaintiffs' ability to recover for actions which may have violated federal law, we shall decline to allow the statute to function retroactively."); *Baker v. Pfeifer*, 940 F. Supp. 1168, 1179 (S.D. Ohio 1996) (citations omitted) ("If the RICO Amendments are applied retroactively to withdraw securities fraud as a permissible predicate act in this case, 'plaintiffs' ability to recover for actions which may have violated federal law' will be impaired. Accordingly, the Court finds that the RICO Amendments operate retroactively."); *In re Prudential Securities Limited Partnerships Litigation*, 930 F. Supp. 68, 79 (S.D.N.Y. 1996) (citations omitted) ("In this case, the RICO amendment does not 'increase a party's liability for past conduct' or 'impose new

duties with respect to transactions already completed.' It does, however, impair the plaintiffs' ability to recover for actions which may have violated federal law because it would strip the plaintiffs' complaint of RICO claims after the statute of limitations for securities fraud claims has likely expired. As a result, the statute should not function retroactively without a clear expression of congressional intent."); *District 65 Retirement Trust v. Prudential Securities*, 925 F. Supp. 1551, 1570 (N.D. Ga. 1996) ("Eliminating predicate acts upon which plaintiffs have rested their complaint for civil RICO remedies, and thereby causing their RICO claims to collapse, impairs the plaintiffs' ability to recover for actions which may have violated federal law. Thus, the statute 'would operate retroactively.' ").

In the instant case, the court of appeals held that the application of SLUSA did *not* have an impermissible retroactive effect, even though the court acknowledged that: (i) SLUSA would preclude Petitioner and all similarly situated investors from bringing a class action in any forum; and (ii) vis-a-vis the potential recovery in a class action, "potential individual recoveries are comparatively small." 2004 U.S. App. LEXIS 7989, **6-7. Hence, the court of appeals acknowledged that the application of SLUSA would impair Petitioner's ability to recover for Respondents' pre-SLUSA fraud, but nonetheless allowed the statute to be applied retroactively.

This Court has not addressed, but should address, the important question of whether a statute that impairs a plaintiff's ability to recover for pre-enactment conduct has an impermissible retroactive effect. In this case, the retroactive application of SLUSA will rob Petitioner and all similarly situated investors of any meaningful opportunity

to seek redress for the heinous fraud that Respondents perpetrated on them. More generally, this Court should adopt the reasoning of the majority of federal courts that have considered the issue and clarify that the impairment of a plaintiff's ability to recover for pre-enactment conduct is among the "new legal consequences" that preclude a statute from being applied retroactively.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant a writ of certiorari to review the decision of the court of appeals.

Respectfully submitted,

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JACOB BLAZ, On behalf of Himself and all others Similarly Situated, Plaintiff-Appellant, versus ROBERT A. BELFER; NORMAN P. BLAKE, JR.; RICHARD B. BUY; RICHARD A. CAUSEY; RONNIE C. CHAN; JOHN H. DUNCAN; ANDREW S. FASTOW; JOE H. FOY; WENDY L. GRAMM; KEN L. HARRISON; ROBERT K. JAEDICKE; KENNETH L. LAY; CHARLES A. LAMAISTRE; JEROME J. MEYER; JEFFREY S. SKILLING; JOHN A. URQUHART; JOHN WAKEHAM; CHARLES E. WALKER; BRUCE G. WILLISON; HERBERT S. WINOKUR, JR.; ARTHUR ANDERSEN LLP, Defendants-Appellees.

No. 03-20575

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

368 F.3d 501; 2004 U.S. App. LEXIS 7989; Fed. Sec. L. Rep. (CCH) P92,801

April 22, 2004, Filed

At issue is the claimed impermissible retrospective application of the Securities Litigation Uniform Standards Act, Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified as amended at 15 U.S.C. §§ 77p & 78bb) (SLUSA), which provides for the removal and dismissal of certain state law securities class actions. Jacob Blaz challenges SLUSA's application to his putative state law securities class action arising out of pre-enactment conduct. The application is permitted because SLUSA governs only secondary conduct – procedural requirements for filing certain state law securities claims – and not the primary conduct that is the subject of those claims. **AFFIRMED**.

I.

In January 2002, more than three years after SLUSA's enactment, Blaz filed this putative state law class action in Texas state court. Blaz presented state law claims for fraud, misrepresentation, and conspiracy in connection with the purchase of publicly traded securities (Enron Corporation) from 11 April 1997 to 15 October 1998 (class period).

The action was removed to federal court pursuant to SLUSA, which provides for removal and dismissal of certain state law securities class actions. *See* 15 U.S.C. § 78bb(f)(1)(A), (B) & (f)(2) (class actions based on state common or statutory law misrepresentation, omission, or deception with respect to purchase of securities subject to removal and dismissal). The parties do not dispute that, under SLUSA, Blaz' state law action is a "covered class action" involving a "covered security". *See* 15 U.S.C. § 78bb(f)(5)(B) & (E).

The class period designated by Blaz ends shortly before SLUSA's enactment on 3 November 1998; Blaz claims the alleged fraud was not discovered until 16 October 2001, almost three years after that enactment. Blaz moved to remand, contesting removal and dismissal on the basis that applying SLUSA to the pre-enactment conduct would have the impermissible retroactive effect of preempting his state law claims. Moreover, acknowledging that the three-year statute of repose under the Securities Exchange Act of 1934 barred his pursuing a federal class action, Blaz contended SLUSA's application effectively denied the putative class meaningful relief.

Remand was denied; the putative state law class action was dismissed with prejudice. *In re Enron Corp.*

Secs, 2002 U.S. Dist. LEXIS 26261, No. H-01-3624 (S.D. Tex. 16 Aug. 2002). In its quite comprehensive and well-reasoned opinion, the district court held: SLUSA's provisions are procedural and do not impair the substantive rights of Blaz or the putative class members individually to pursue their claims in state court; consequently, SLUSA does not have an impermissible retroactive effect. 2002 U.S. Dist. LEXIS 26261 at 22-23.

II.

In our deciding whether applying SLUSA to the pre-enactment conduct at issue has an impermissible retrospective effect, the remand-denial and dismissal are reviewed *de novo*. *E.g.*, *Morris v. TE Marine Corp.*, 344 F.3d 439, 443 (5th Cir. 2003) (citing *Miller v. Diamond Shamrock Co.*, 275 F.3d 414, 417 (5th Cir. 2001)). For essentially the reasons stated by the district court, we hold that such application is permissible.

Landgraf v. USI Film Products, 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994), provides the well-settled framework for determining the issue at hand. "The *presumption* against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* at 265 (emphasis added). Nevertheless, "changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity . . . because rules of procedure regulate secondary rather than primary conduct". *Id.* at 275 (citations omitted). *See also Hughes Aircraft v. United States ex rel. Schumer*, 520 U.S. 939, 138 L. Ed. 2d 135, 117 S. Ct. 1871 (1997) (applying *Landgraf* analysis to action filed after amendment to statute,

but challenging pre-enactment conduct). A two-part alternative analysis is used for determining whether the presumption against retroactivity is rebutted.

First, retroactive application is not impermissible where there is an express congressional intent favoring it. *Landgraf*, 511 U.S. at 280. In SLUSA, Congress did not expressly provide for such application.

Second, such application is permissible if it does not "*impair rights a party possessed when he acted*, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed". *Id.* (emphasis added). Blaz claims SLUSA's application impairs the substantive rights of defrauded securities purchasers to pursue class relief in state court.

In this regard, relying on *W.R. Huff Asset Management Co., LLC v. BT Securities Corp.*, 190 F. Supp. 2d 1273 (N.D. Ala. 2001), Blaz contends SLUSA has an impermissible retroactive effect by unfairly depriving class members of meaningful access to the courts. As in the action at hand, the *BT Securities* plaintiffs: filed an action post-SLUSA's enactment, involving pre-enactment conduct, *id.* at 1275; and could no longer pursue a federal securities class action because it would be time-barred by the three-year statute of repose, *see* Section 18(c) of the Securities Exchange Act of 1934, 48 Stat. 881, 898 (codified at 15 U.S.C. § 78r(c)). (Pursuant to the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 804(a) & (b), 116 Stat. 801 (codified at 28 U.S.C. § 1658(b)), this statute of repose has been extended to five years after the conduct accrues.) *BT Securities* concluded:

The practical effect of a retrospective application of SLUSA would be to trim down [plaintiffs'] case to a virtual

nothing. Not taking this eventuality into account when measuring the impact of retrospective application in this case would be holding [plaintiffs] accountable for [their] "failure" to bring [their] state law claims within the periods of repose and limitation applicable to federal claims that are preemptive only if retroactive. . . . The reasonable expectations [plaintiffs] had at the time of the allegedly actionable conduct cannot be reconciled with such a relinquishment of a *substantive right*.

BT Securities, 190 F. Supp. 2d at 1281 (emphasis added).

Blaz contends: this analysis applies with even greater force here because defendants fraudulently concealed their wrongdoing until 16 October 2001 and therefore prevented filing a federal securities class action within the statute of repose; and it is unfair to permit such fraudulent concealment likewise to deny him a class action in state court, by application of SLUSA. Blaz] acknowledges that he and other putative class members individually may pursue their claims in state court; but, he maintains this access to those courts will not be meaningful because potential individual recoveries are comparatively small. According to Blaz, this causes SLUSA to operate to create "new legal consequences", not present before its enactment, that transform its retrospective effect from procedural to substantive. Blaz notes that, although there is no right to "litigate" a claim as a class action, Rule 23 of the Federal Rules of Civil Procedure confers the right to "seek" certification of a class action, including the rights to have the district court consider a class certification motion and to appeal an order denying such certification. *See* FED. R. CIV. P. 23.

A.

Obviously, Blaz' attempt to distinguish "litigating" a class action from "seeking" one fails; for purposes of the issue at hand, there is no difference. Nor is there a substantive right to pursue a class action, in either Texas state or federal court. As the Texas Supreme Court explained:

> The class action is a *procedural device* intended to advance judicial economy by trying claims together that lend themselves to collective treatment. It is not meant to alter the parties' burdens of proof, right to a jury trial, or the substantive prerequisites to recovery under a given tort.

Southwestern Ref. Co., Inc. v. Bernal, 22 S.W.3d 425, 437, 43 Tex. Sup. Ct. J. 706 (Tex. 2000) (emphasis added); *see also Frazar v. Gilbert*, 300 F.3d 530, 545 (5th Cir. 2002) ("A class action is merely a procedural device; it does not create new substantive rights. . . ."), *rev'd on other grounds*, *Frew ex rel. Frew v. Hawkins*, 157 L. Ed. 2d 855, 124 S. Ct. 899 (2004). In his state court complaint, Blaz defines the class period as ending on 15 October 1998 and claims that the alleged fraudulent conduct was not discovered until 16 October 2001 – exactly *one day* past the then three-year statute of repose for a federal securities claim. In the light of his class period and discovery date, Blaz could not pursue a federal class action. Of course, it is the defined class period and claimed fraudulent concealment, *not SLUSA's retroactive application*, that causes this result. In any event, there is no right to pursue a state class action; and, again, despite SLUSA's application, each plaintiff may pursue individual relief in state court.

B.

As *Landgraf* explained, retrospective changes to "procedural rules" do not raise retroactivity concerns because they regulate secondary, rather than primary, conduct. *Landgraf*, 511 U.S. at 275. SLUSA provides a procedural framework for the secondary conduct of filing certain state securities claims; it does not regulate the primary conduct that is the subject of those claims. Again, there is no substantive right to a class remedy; a class action is a procedural device. As such, SLUSA's regulating filing certain state securities claims is not impermissibly retroactive.

Except for the *BT Securities* court, all others that have evaluated the retrospective application of SLUSA have reached this conclusion. *See, e.g., Prof'l Mgmt. Assocs. v. KPMG LLP*, 335 F.3d 800, 803-04 (8th Cir. 2003) (applying SLUSA to pre-enactment conduct presents no retroactivity concern because SLUSA regulates only "secondary conduct, the filing of the lawsuit, not the primary, allegedly illegal pre-enactment conduct"); *see also Winne v. Equitable Life Assur. Soc'y of the United States*, 2003 U.S. Dist. LEXIS 19073, 2003 WL 22434215, *9 (S.D.N.Y. 2003) ("since SLUSA governs only procedural requirements and is not substantive in scope, it may be applied to suits . . . that were filed after . . . the statute's enactment, even if those suits concern pre-enactment conduct") (citing *Gray v. Seaboard Securities, Inc.*, 241 F. Supp. 2d 213, 217-18 (N.D.N.Y. 2003)).

For the foregoing reasons, the judgment is

AFFIRMED.

In Re Enron Corporation Securities, Derivative & "ERISA" Litigation; THIS DOCUMENT RELATES TO: H-02-1150; MARK NEWBY, ET AL., Plaintiffs VS. ENRON CORPORATION, ET AL., Defendants; JACOB BLAZ, On Behalf of Himself and All Others Similarly Situated, Plaintiff VS. ROBERT A. BELFER, NORMAN P. BLAKE, JR., RICHARD B. BUY, RICHARD A, CAUSEY, RONNIE C. CHAN, JOHN H. DUNCAN, ANDREW S. FASTOW, JOE H. FOY, WENDY L. GRAMM, KEN L. HARRISON, ROBERT K. JAEDICKE, KENNETH L. LAY, CHARLES A. LEMAISTRE, JEROME J. MEYER, JEFFREY S. SKILLING, JOHN A. URQUHART, JOHN WAKEHAM, CHARLES E. WALKER, BRUCE G. WILLISON, HERBERT S. WINOKUR, JR., AND ARTHUR ANDERSEN LLP, Defendants

MDL-1446, CIVIL ACTION NO. H-01-3624 CONSOLIDATED CASES CIVIL ACTION NO. H-02-1150

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

MEMORANDUM AND ORDER OF DISMISSAL

Pending before the Court is Plaintiff Jacob Blaz's motion for remand (instrument # 556 in H-01-3624).

Plaintiff's original petition, brought as a class action on behalf of himself and all purchasers of the publicly traded securities of Enron Corporation from April 11, 1997 through October 15, 1998 (the proposed Class Period), alleges fraud in stock transactions in violation of Tex. Bus. & Com. Code § 27.01, and Texas common-law claims of fraudulent misrepresentation, negligent misrepresentation and conspiracy. Blaz filed the suit, Cause No. 2002-05068, in the 234th Judicial District Court, Harris County,

Texas on January 30, 2002. Defendant Kenneth L. Lay was served on March 6, 2002 and removed the suit on March 30, 2002, pursuant to the Securities Litigation Uniform Standards Act ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227 (1998), codified at 15 U.S.C. §§ 77p (amending Securities Act of 1933) and 78bb (amending Securities Exchange Act of 1934) (West 2002).[1] SLUSA was enacted on November 3, 1998, immediately after the Class Period.

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[1] SLUSA provides for mandatory removal and dismissal of a specific kind of class action:

> (f) LIMITATIONS ON REMEDIES. –
>
> (1) CLASS ACTION LIMITATIONS. – No covered class action based upon the statutory or common law of any state or subdivision thereof may be maintained in any State or Federal court by any private party alleging –
>
> (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.
>
> (2) REMOVAL OF COVERED CLASS ACTIONS. – Any covered class action brought in an [sic] State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

15 U.S.C. § 78bb(f)(1)(A),(B) & (2) (amending Securities Exchange Act of 1934); parallel provision for amendment to 1933 Act is § 77p(b) and (c).

A "covered security" is defined as "a security issued by an investment company that is registered or that has filed a registration statement, under the Investment Company Act of 1934." 15 U.S.C. § 77r(b)(2). Title 15 U.S.C. § 78bb(f)(5)(B) defines a "covered class action" as

> (i) any single lawsuit in which –

(Continued on following page)

Plaintiff contends that the removal was defective because it was effected by an impermissible retroactive application of SLUSA to preempt his state law claims. *W.R. Huff Asset Management Cl., L.L.C. v. BT Securities Corp.*, 190 F. Supp. 2d 1273 (N.D. Ala. 2001) (holding that SLUSA did not apply retroactively to conduct predating its enactment even though suit was filed post-enactment and

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> (I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominated over any question affecting only individual persons or members or
>
> (II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or
>
> (ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –
>
> (I) damages are sought on behalf of more than 50 persons; and
>
> (II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

15 U.S.C. § 78bb(f)(5)(B).

Thus SLUSA authorizes the removal to federal court of all private class actions grounded in state law that are actionable under federal securities law and that fall within SLUSA's definitions of "covered class action" and "covered security." Furthermore it subjects those state-law claims to dismissal. 15 U.S.C. § 78bb(f)(1)-(2). *See, e.g., Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1341 (11th Cir. 2002); *Patenaude v. Equitable Life Assurance Soc. of U.S.*, 290 F.3d 1020, 1023-24 (9th Cir. 2002); *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 109-10 (2d Cir. 2001).

remanding case to state court). SLUSA was enacted on November 3, 1998.

Here, Defendants' alleged misconduct giving rise to the claims in member case H-02-1150 occurred just prior to SLUSA's enactment date (the Class Period is April 11, 1997 to October 15, 1998), but the suit was not filed in Texas state court or served until more than three years after the enactment.

APPLICABLE LAW

The key case in retroactivity analysis is *Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994). Although in Landgraf, the analysis focused upon whether an amendment to the Fair Claims Act should be retroactively applied to a case already pending at the time the amendment was enacted, challenging conduct that occurred before the enactment, in *Hughes Aircraft v. United States ex rel. Schumer*, 520 U.S. 939, 138 L. Ed. 2d 135, 117 S. Ct. 1871 (1997), the Supreme Court applied the logic of Landgraf to a suit filed after an amendment to the Fair Claims Act was enacted, but challenging conduct that occurred before the statute's enactment. *W.R. Huff Asset Management*, 190 F. Supp.2d at 1275-76. Accordingly, because the Blaz case presents the same procedural stance as Hughes Aircraft, this Court applies the Landgraf analysis to resolve the issue before it.

Noting that aside from provisions in the Constitution that prohibit retroactivity,[2] the Supreme Court recognized

[2] As examples the Court notes the ex post facto clause in the eighth amendment (prohibiting retroactive application of penal legislation), Article I, § 10, cl. 1 (prohibiting states from retroactively passing laws

(Continued on following page)

that the traditional presumption against retroactivity arose because "considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly" and that "familiar considerations of fair notice, reasonable reliance, and settled expectations" should guide a court in determining whether that presumption should apply. *Landgraf*, 511 U.S. at 265, 270. The high court observed that deciding "when a statute operates 'retroactively' is not always a simple or mechanical task." *Id.* at 268. It made clear that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law [citations omitted]." *Id.* at 269. The critical question is "whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 270.

Furthermore, in discussing retroactivity relating to various kinds of new statutes, the high court emphasized the significance of the focal point of the new law. For example, the Court summarily cited examples to demonstrate that it had "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when

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that "impair[ ] the Obligation of Contracts"), the fifth amendment's taking clause (barring legislatures and government officials from depriving private persons of vested property rights except for "public use" and upon payment of "just compensation"), Art. I. §§ 9-10 (prohibiting bills of attainder by legislature), and the due process clause. 511 U.S. at 266.

the underlying conduct occurred or when the suit was filed."[3] *Id.* at 274. It observed that instead of applying "the traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment," based on "the unfairness of imposing new burdens on persons after the fact," the court should "apply the law in effect at the time it renders its decision" to procedural changes to existing law, such as statutes that alter only jurisdiction. *Id.* at 278, 270, 264. It explained that "application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Id.*

The Supreme Court also pointed out, "Changes in procedural rules may often be applied in suits arising before their enactment without concerns about retroactivity." *Id.* at 274-74 (citations omitted). It further explained, "Because rules of procedure regulate secondary conduct rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive," even where the new rules "operated to a defendant's disadvantage." *Id.* at 275 & n.28. "Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity." *Id.* at 275. *See, e.g., Adepegba v. Hammons*, 103 F.3d 383 (5th Cir. 1996) (holding that the amended i.f.p. requirements of the Prison Litigation Reform Act,

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[3] In one example, *Bruner v. United States*, 343 U.S. 112, 96 L. Ed. 786, 72 S. Ct. 581 (1952), the Supreme Court, "relying on our 'consistent practice, . . . ordered an action dismissed because the jurisdictional statute under which it had been (properly) filed was subsequently repealed." *Landgraf*, 511 U.S. at 274.

requiring the prepayment of fees by inmate litigants after dismissal of three actions or appeals as frivolous, could be applied retroactively to cases pending before the effective date of the statute because the consequences were matters of procedure, because there was no absolute right to pursue a civil appeal i.f.p., but only a privilege, because the rule governed secondary conduct rather than primary conduct, and because it did not impose new or additional liabilities). Nevertheless, the Supreme Court cautioned, "Of course, the mere fact that a new rule is procedural does not mean that it applies to every pending case." *Id.* at 275 n.29. In *Lindh v. Murphy*, 521 U.S. 320, 326, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997), the Court further admonished that in determining whether a new statute operated retroactively, merely attaching a label such as "procedural" or "collateral" to the law was insufficient; the court must examine whether it actually operates in a retroactive manner.

As the threshold step in a retroactivity analysis of a statute enacted after the conduct challenged in a civil suit has occurred, Landgraf required a determination by a court "whether Congress has expressly prescribed the statute's proper [temporal] reach." *Landgraf*, 511 U.S. at 280. If the congressional intent is clear, it controls and "there is no need too [sic] resort to judicial default rules." *Id.* If the temporal reach of the new law is not made explicity by Congress, the Court must determine if application of the statute to the challenged conduct would result in an impermissible retroactive effect, such as "impairing a party's liability for past conduct, or imposing new duties with respect to transactions already completed." *Id.* If the statute would have such an impermissible effect, the traditional presumption against retroactivity would apply.

Id. Nevertheless the Supreme Court admonished, "The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration." *Id.* at 266.

Subsequently, the Supreme Court has also made clear that "in determining a statute's temporal reach generally, our normal rules of construction apply." *Lindh v. Murphy*, 521 U.S. 320, 326, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997); *Graham v. Johnson*, 168 F.3d 762, 781 (5th Cir. 1999), cert. denied, 529 U.S. 1097 (2000).

The only indication of the temporal scope of SLUSA is found in the "Applicability" note appended to 15 U.S.C. Sec. 77p: "The amendments made by this section shall not affect or apply to any action commenced before and pending on the date of enactment of this Act." PL-105-35 § 101(c).

In *Hartford Casualty Ins. Co. v. F.D.I.C.*, 21 F.3d 696 (5th Cir. 1994), the Fifth Circuit, relying on Landgraf because the statute in dispute did not expressly indicate its temporal scope, held that a section of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821(f)(4), which placed all claims involving deposit insurance within the exclusive jurisdiction of the federal Courts of Appeals, may be applied retroactively because while it changed the forum that heard deposit insurance disputes, it did not alter the substantive rights of the parties or deprive any litigant of its day in court. *Id.* at 700-01. In the same case, the Fifth Circuit also examined 12 U.S.C. § 1821(f)(5), imposing a sixty-day time limit on requests for final determinations by the FDIC, and refused to apply it retroactively because such application would extinguish claims that were valid

before the statute's enactment and deprive Hartford Insurance Company of a forum, despite the fact that Hartford had acted properly under the law existing when the claims arose and "there is no way Hartford could have foreseen" that the 60-day limitation would one day come into effect to nullify its claims. *Id.* at 702. The panel distinguished Hartford's situation if the sixty-day limitation were applied from its situation under the other provision's mere change of forum because in the latter instance the substantive rights of the parties were not impaired. *Id.* The Fifth Circuit quoted from *Landgraf*, 511 U.S. at 275 n.29, "'The mere fact that a new rule is procedural does not mean that it applies to every pending case.'" *Id.* To apply the new limitation retroactively, while perhaps not unconstitutional, would be "manifestly unjust" because it would "infringe upon or deprive a person of a right that had matured'" and would impose "'unanticipated obligations . . . upon a party without notice or an opportunity to be heard.'" *Id.*, citing *Bradley v. School Board*, 416 U.S. 696, 720, 40 L. Ed. 2d 476, 94 S. Ct. 2006 (1974).

PLAINTIFF'S AUTHORITY

Plaintiff's sole authority for remand based on retroactive application of SLUSA, *W.R. Huff Asset Management*, 190 F. Supp. 2d 1275, is the only case that this Court has discovered that directly addresses the issue of SLUSA's retroactivity. In that removed class action, asserting only state-law claims for fraud and misrepresentation in connection with a sale of securities, Judge Acker, highlighting the fact that, like the Blaz case before this Court, the W.R. Huff case was not pending at the time of SLUSA's enactment, concluded that a retroactive application of

SLUSA to it as a post-enactment suit was not clearly and unambiguously addressed by the temporal proscription in the "Applicability" note provision. Therefore he questioned whether the retroactive application of SLUSA to the suit would have impermissible legal effects and found that it would. 190 F. Supp.2d at 1276-77.

Judge Acker first reasoned that retroactive application of SLUSA would deny defendants their procedural class action rights despite the fact that W.R. Huff had served the other proposed class members as their representative during the Class Period, thus "running afoul of the notions of 'fair notice,' 'reasonable reliance,' and 'settled expectation.'" 190 F. Supp.2d at 1279:

> If SLUSA applies, it will deny Huff and the individuals on whose behalf it purports to act the efficient resolution of claims naturally suited to group action and will expose them to the shortcomings inherent in separate actions. Such exposure runs counter to the concepts of fair notice, reasonable reliance, and settled expectation and would attach legal consequences to complete events that form the factual basis for Huff's complaint . . . An additional element of unfairness . . . rests on the fact that at the time of Huff's alleged discussions and transactions with defendants, Huff was acting as an investment manager and as attorney-in-fact for unnamed clients who comprise the group which would otherwise have to proceed as individuals. Huff was treated by defendants as the representative of a group. It is not unreasonable, then, for Huff and its clients to have expected that if Huff was misled while operating in its representative capacity, it could bring suit in that same capacity under then existing legal theories to remedy the wrong.

> If Huff was the conduit for defendants' fraud on its clients, it is hardly fair to take away, post hoc, Huff's right to seek redress for that fraud.

Id. at 1280.

Furthermore, Judge Acker reasoned that if W.R. Huff Management had brought its claims as a class action under federal law, a number of the claims would have been time-barred by the one-year statute of limitations after discovery of wrongdoing and three-year period of repose for claims under § 10(b) of the Securities Exchange Act of 1934. *Id.* at 1280-81. He summarized. "The practical effect of a retrospective application of SLUSA would be to trim down Huff's case to a virtual nothing." *Id.* at 1281. He concluded, "The reasonable expectations they had at the time of the allegedly actionable conduct cannot be reconciled with such a relinquishment of a substantive right." *Id.*

Finally, drawing on the "principles of federalism and comity which recognize that federal courts are courts of limited jurisdiction," Judge Acker decided, "When Congress is ambiguous on the question of retroactivity of a preemptive federal statute, and when removability depends upon a retroactive application of that statute, the ambiguity must be resolved against removability and thus against retroactivity." *Id.*[4]

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[4] This Court notes that Judge Acker did not address the intent of Congress in passing SLUSA to do precisely what Judge Acker found impermissible. Congress has enacted several federal statutes in the past few years to attempt to establish uniformity in the securities markets. The Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §§ 77z-1, 78u, which amended the 1933 Securities Act and the 1934 Securities Exchange Act, set out heightened pleading

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ARTHUR ANDERSEN, L.L.P.'S OPPOSITION

Arthur Andersen, L.L.P. ("Andersen") correctly emphasizes that SLUSA has not denied Blaz his substantive rights, i.e., the opportunity to pursue his state law claims individually against Defendants, but only precludes his ability to pursue them as a class action in state court. Andersen characterizes the statute as "purely procedural" and thus not an impermissible retroactive impediment to cases, like Blaz's, that were filed after its enactment. *Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000), cert. denied sub nom. *Johnson v. Tele-Cash, Inc.*, 531 U.S. 1145, 148 L. Ed. 2d 957, 121 S. Ct. 1081 (2001); *Beamon v. Brown*, 125 F.3d 965, 969 (6th Cir. 1997) (class action "is merely a procedural device"). Indeed, the statute's removal provision relates only to jurisdiction and procedure. *Landgraf*, 511 U.S. at 274 ("Application of a new jurisdictional rule usually takes away no substantive right, but simply changes the tribunal that is to hear the case. Present law normally governs in such situations

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requirements and, for complaints under Rule 10b-5, mandated pleading of specific facts creating a strong inference of scienter for private class actions and other suits alleging securities fraud in an effort to minimize meritless lawsuits. 15 U.S.C. § 78 et seq. H. Conf. Rep. No. 105-803 (1998). When, as a result, plaintiffs began filing in state rather than federal court, asserting claims under state statutory or common law to avoid the PSLRA's stringent procedural and pleading hoops, Congress passed SLUSA in 1998 to close the loophole. 144 Cong. Rec. H10771 (daily ed. Oct. 13, 1998, 1998 WL 712049). SLUSA in essence made federal court the exclusive venue for securities fraud class actions meeting its definitions and ensured they would be governed exclusively by federal law. 15 U.S.C. § 77p(b)-(c). Congress' purpose in enacting the statute was to " 'prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State court, rather than Federal court.' " *Korsinsky v. Salomon Smith Barney, Inc.*, 2002 U.S. Dist. LEXIS 259, No. 01 6085(SWK), 2002 WL 27775, *3 (S.D.N.Y. 2002) quoting H.R. Conf. Rep. No. 105-803 (1998).

because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties."); *Hughes Aircraft*, 520 U.S. at 951 ("Statutes merely addressing which court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties."); *State of Nebraska ex rel. Dep't of Soc. Servs. v. Bentson*, 146 F.3d 676, 678 (9th Cir. 1998).

Furthermore, Andersen argues that Judge Acker erroneously focused upon the allegedly fraudulent conduct of the defendants, rather than the conduct of the plaintiff in prosecuting and maintaining the suit, as the key to the retroactivity analysis. 190 F. Supp.2d at 1276. Andersen argues that since this suit was filed after the enactment and, as a statute of limitations, SLUSA relates to the conduct of the plaintiff in filing the suit and maintaining the suit, but not to the defendants' conduct in allegedly defrauding investors (the substantive challenge of the suit), the application of SLUSA is prospective, not retroactive.[5] *See also In re BankAmerica Corp. Sec. Litig.*, 95 F. Supp.2d 1044, 1046 n.2 (E.D. Miss. 2000) (in dicta,

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[5] Defendant Lay agrees, citing *Forest v. United States Postal Service*, 97 F.3d 137, 139-40 (6th Cir. 1996) ("A statute of limitations does not relate to the conduct of a defendant, but instead relates to plaintiff's conduct in filing the claim."); *Landgraf*, 511 U.S. at 275 ("the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive"); *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 168 F. Supp.2d 1352, 1356 (M.D. Fla. 2001) ("SLUSA bars a specific form of action based on a specific set of facts, namely a class action arising under the enumerated circumstances described in SLUSA. The operative language in SLUSA poses no bar to pursuit of individual actions regarding securities in state courts.").

SLUSA "is not retroactive and does not apply to suits filed prior to November 3, 1998, the effective date of the Act"), aff'd, 263 F.3d 795 (8th Cir. 2001), cert. denied, 122 S. Ct. 1437 (2002). Andersen compares it to the situation underlying *Lindh v. Murphy*, 521 U.S. 320, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997), involving amendments to the federal habeas corpus statute that also governed the conduct of the litigation, not the underlying conduct of the defendants.

Furthermore, in determining the temporal reach of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254 (1996) in Lindh, Andersen observes that the Supreme Court drew a "negative inference" from a provision in chapter 54, applicable only to capital cases, which stated that amendments to capital-case chapter "shall apply to cases pending on or after the date of enactment of this Act," 521 U.S. at 327; the Supreme Court unanimously construed this provision to mean that amendments to the chapter (153), dealing with habeas proceedings generally, applied "to the general run of habeas cases only when those cases had been filed after the date of the Act." *Id.* 329 ("Nothing . . . but a different intent explains the different treatment"), 336, 344-45 (Rehnquist, C.J. dissenting). Similarly, Andersen reads the Applicability note in SLUSA to negatively imply that SLUSA does apply to actions commenced after the date it was enacted, which would include Blaz's suit.

Andersen also urges that the fact that Blaz's suit "is now subject to dismissal under SLUSA results from his own choice to bring a class action rather than an individual act." Moreover, even though Blaz has contended that if his motion to remand is denied, "the Class would thus be precluded from seeking any relief in any forum," Andersen

answers that because no class has been certified, the dismissal is not binding on absent putative class members, who, like Blaz, can also bring individual state-law actions.

Blaz also argues that if SLUSA extinguishes his right to pursue a class action, he has been denied procedural due process. Andersen responds by quoting *McMurtray v. Holladay*, 11 F.3d 499, 504 (5th Cir. 1993) (citing *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445, 60 L. Ed. 372, 36 S. Ct. 141 (1915) (Holmes, J.)): "The Supreme Court long ago established that, when a legislature extinguishes a property interest via legislation that affects a general class of people, the legislative process provides all the process that is due."

Andersen also distinguishes the facts in Blaz from those in W.R. Asset Management, in that Judge Acker found W.R. Huff was "the conduit for defendants' [alleged] fraud on [the plaintiff's] clients" and therefore it was particularly appropriate that W.R. Huff should be allowed to act as a class representative for these clients. Here, in contrast, Blaz asserts generic claims on behalf of all purchasers of Enron's publicly traded securities from April 11, 1997 through October 15, 1998.

Finally, Andersen contends, if principles of retroactivity barred application of SLUSA to pending cases, the "Applicability" note to 15 U.S.C. § 77p ("shall not affect or apply to any action commenced before and pending on the date of enactment to this Act") would merely be surplusage in violation of the principles of statutory construction. *North Star Steel Co. v. Crown Cork & Seal Co.*, 515 U.S. 29, 34, 132 L. Ed. 2d 27, 115 S. Ct. 1927 (1995) ("it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with our precedents and

that it expects its enactments to be interpreted in conformity with them"); *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562, 109 L. Ed. 2d 588, 110 S. Ct. 2126 (1990) (Supreme Court cases "express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.").

KENNETH L. LAY'S OPPOSITION

Plaintiff has asserted, "It is likely that Congress never contemplated the effect of SLUSA on an action like the one at bar, and it is certain that Congress did not specifically intend SLUSA to preclude such an action." In addition to joining in the arguments of Arthur Andersen, Defendant Lay has pointed out that SLUSA's legislative history reveals that Congress was aware of the legal effect of the short federal limitations period for § 10(b) claims and intended that application of SLUSA preemption would time-bar a class action such as Blaz's because that very argument was made by Senators Sarbanes, Bryan and Johnson. In passing SLUSA, Congress rejected their criticism of the federal limitations period, quoted here:

> The overly broad definition of "class action"[6] n6 leads directly to another of the bill's flaws. The

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[6] Senators Sarbanes, Bryan and Johnson criticized the expanded definition of "class action" under SLUSA, which

> may include State court actions brought by separate individual investors, or by groups of public investors such as school districts or local governments. They risk being dragged into Federal court against their will, potentially depriving them of more favorable State statutes of limitations, pleading standards, joint and several liability, and so on. . . . The new [provisions] include as a class action any group of lawsuits in which damages are sought on behalf of more than 50 persons,

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> Federal statute of limitations, which the SEC considers unduly short, will now apply in an unfair manner to State cases as well. Cases that were timely filed under State statutes of limitations may now be removed to Federal court and dismissed under the shorter Federal statute of limitations. . . . Since most States have a statute of limitations longer than the Federal time period, it is likely that most investors will have to satisfy a shorter statute of limitations. In other words, investors who filed timely lawsuits under State law may find their lawsuits dismissed for failure to meet a shorter time requirement that they could not have known would be applied to them.

S. Rep., No. 105-182, 1998 WL 226714, *20-21 (1998) (Additional Views of Senators Sarbanes, Bryan and Johnson).

> if those lawsuits are pending in the same court, involve common questions of law or fact, and have been consolidated as a single action for any purpose. Even if the lawsuits are brought by separate lawyers, without coordination, and common questions do not predominate, they may qualify as a class action and thus be preempted. So, if an individual investor chooses to bring his own lawsuit in State court, to bear the expenses of litigation himself in order to avoid the provisions of the Litigation Reform Act, he can be forced into Federal court and made to abide by the Federal rules if 50 other investors each make the same decision. Indeed, the Bill provides an incentive for defendants to collude with parties to ensure that the preemption threshold is reached. Such a result does not merely end abuses associated with class action lawsuits, it deprives investors of their remedies.

S. Rep., No. 105-182, 1998 WL 226714, *19-20 (1998) ("Additional Views of Senators Sarbanes, Bryan and Johnson").

COURT'S RULING

This Court disagrees with Judge Acker's conclusion that SLUSA may not be retroactively applied.

The Court does agree that the statute does not explicitly and clearly indicate its temporal scope. While Andersen's negative inference argument to construe the Applicability note is interesting, the Court does not find it fully persuasive because it appears to be a forced reading of what is merely a note to the statute, rather than part of its text or definition section.

Because the Court fails to find unambiguous intent of Congress that this statute may be applied to a post-enactment lawsuit challenging pre-enactment conduct, the Court utilizes the Landgraf judicial default rules and inquires whether SLUSA "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." 511 U.S. at 280. After considering the issue, this Court concludes that application of SLUSA to this suit is not impermissibly retroactive.

A class action is a procedural device for aggregation of claims in order to "reduce or eliminate a multiplicity of suits." 3B James William Moore, et al., Moore's Practice par. 23.03 (2d ed. 1980). There is no absolute right to bring a suit as a class action; "the decision to certify [a class] is within the broad discretion of the court . . . exercised within the framework of rule 23." *Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1993). A plaintiff must meet standing requirements and the prerequisites of Fed. Rule of Civil Procedure 23(a) and (b)(1), (b)(2) or (b)(3), or its state counterpart, Texas Rule of Civil Procedure 42. "The procedural device of a Rule 23(b)(3) action was designed not solely as a

means for assuring legal assistance in the vindication of small claims but, rather, to achieve economies of time, effort, and expense." *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1196 (6th Cir. 1988). Because the Texas rule is "patterned after Federal Rule of Civil Procedure 23 . . . , federal decisions and authorities interpreting current federal class action requirements are persuasive authority." *Southwestern Refining Co., Inc. v. Bernal*, 22 S.W.3d 425, 439, 43 Tex. Sup. Ct. J. 706 (Tex. 2000).

Plaintiff contends that he was deprived of his right to bring a class action in Texas state court based on state-law for defendants' alleged misconduct regarding Enron securities. In Southwestern Refining, the plaintiffs argued that denying them class action treatment in essence constituted "denial of legal redress for many of the . . . plaintiffs, because many of their claims are simply too small to justify the cost of individual litigation." 22 S.W.3d at 438. The Texas Supreme Court made clear that "'there is no right to litigate a claim as a class action.'" *Id.* at 439, quoting *Sun Coast Resources, Inc. v. Cooper*, 967 S.W.2d 525, 529 (Tex. App. – Houston [1st Dist.] 1998, pet. dism'd w.o.j.). The Texas Supreme Court emphasized,

> The class action is a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment. It is not meant to alter the parties' burdens of proof, right to a jury trial, or the substantive prerequisites to recovery under a given tort. Procedural devices may "not be construed to enlarge or diminish any substantive rights or obligations of any parties to any civil action." Tex. R. Civ. P. 815. . . .

Id. at 437.

Blaz has not lost his right to pursue his claims individually in Texas state court. Thus he still has a tribunal and may have his day in court to pursue a just resolution of his claims. *Hartford Ins.*, 21 F.3d 696.

Moreover, the Court concludes there is no manifest injustice in the legal effect of SLUSA in denying him the opportunity at this point to pursue his claims on a class basis in federal court because the federal limitations period is shorter than that applicable to Texas' fraud claims. This Court would point out that the Supreme Court had long before handed down its ruling in *Lampf, Pleva, Lipkind, Prupis & Pettigrew v. Gilbertson*, 501 U.S. 350, 364, 115 L. Ed. 2d 321, 111 S. Ct. 2773 (1991),[7] holding that the Securities Exchange Act of 1934 established a uniform rule that "litigation instituted pursuant to § 10(b) and Rule 10b-5 must be commenced within one year after discovery of the facts constituting the violation and within three years after the violation." Furthermore, when SLUSA was enacted on November 3, 1998, it gave notice to Plaintiff that the procedural device of a class action involving securities claims under state law would be eliminated. At that time Blaz could still have filed a timely class action in federal court under federal law, but he chose to wait until 2002 to file suit and serve a defendant in state court, i.e., until his federal statute of limitations under Sec. 10(b) had expired. *Cf. Hartford Casualty*, 21 F.3d 696. Thus Blaz's own inaction denied him the opportunity to pursue his claims by means of a class action.

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[7] Before Lampf, Texas applied the four-year statute of limitations applicable to fraud actions to § 10b claims filed in this state. *In re Sioux, Ltd., Sec. Litig. v. Coopers & Lybrand*, 914 F.2d 61, 64 (5th Cir. 1990).

Moreover SLUSA exemplifies a rule of procedure that regulates secondary rather than primary conduct the plaintiff's filing and prosecution of the litigation, as opposed to the defendant's allegedly unlawful conduct. Liability under the statute is based on the same kind of activities by a defendant as existed before SLUSA's enactment. What SLUSA eliminates is a state-court forum for class actions arising from securities violations under state law pursuant to Congress' right, under the Supremacy Clause, to impose uniform and stringent pleading standards in such suits in an effort to eliminate abusive litigation and to prevent plaintiffs from evading the protections of federal law. The Supreme Court has a practice of "regularly applying intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf*, 511 U.S. at 274.

Thus, given the fact SLUSA's new provisions are procedural and did not impair the substantive right of Blaz or any of the prospective class members to pursue their claims or deprive them of a day in court, nor completely deny their access to court, the Court sees no impediment in applying the law in effect at the time Blaz filed his suit, i.e., SLUSA.

Accordingly, for these reasons, the Court

ORDERS that Plaintiff's motion to remand is DENIED. Furthermore, because Blaz has asserted only class claims based on state law that are preempted by SLUSA, pursuant to 15 U.S.C. Sec. 78bb(f)(1)(B)(2), the Court

ORDERS that Member Case No. H-02-1150 is hereby SEVERED from H-01-3624, that Blaz's state-law class

claims are DISMISSED with prejudice, and that H-02-1150 is CLOSED.

SIGNED at Houston, Texas, this 15th day of August, 2002.

MELINDA HARMON

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-20575

JACOB BLAZ, On behalf of Himself and all others Similarly Situated

Plaintiff-Appellant

v.

ROBERT A BELFER; NORMAN P BLAKE, JR; RICHARD B BUY; RICHARD A CAUSEY; RONNIE C CHAN; JOHN H DUNCAN; ANDREW S FASTOW; JOE H FOY; WENDY L GRAMM; KEN L HARRISON; ROBERT K JAEDICKE; KENNETH L LAY; CHARLES A LEMAISTRE; JEROME J MEYER; JEFFREY S SKILLING; JOHN A URQUHART; JOHN WAKEHAM; CHARLES E WALKER; BRUCE G WILISON; HERBERT S WINOKUR, JR; ARTHUR ANDERSEN LLP

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Filed May 20, 2004)

(Opinion 4/22/04, 5 Cir., ___, ___ F.3d ___)

Before DAVIS, BARKSDALE, and PRADO, Circuit Judges

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Rhesa H. Barksdale
United States Circuit Judge

Judge DeMoss did not participate in the consideration of the rehearing en banc.